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No. 93-812

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

ALDEN JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONERS

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December 30, 1993

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Respondents' Brief in Opposition attempts to recharacterize the legal issues in this case as factbound arguments over a particular record. It does so under cover of a shrill attack that further seeks to divert attention from the opinion under review. Respondents have presented no valid reason why the Court should not grant review now to provide guidance on the important voting rights questions presented.

1. The court of appeals' remand to the district court provides no reason to delay review of the important issues raised in the petition. The Court routinely grants certiorari to review legal issues following court of appeals decisions ordering further proceedings on remand. *See, e.g., Denton* v. *Hernandez*, 112 S. Ct. 1728, 1732 (1992); *Holmes* v.

Securities Investor Protection Corp., 112 S. Ct. 1311, 1315-16 (1992); *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 112 S. Ct. 683, 687 (1992). No further proceedings on remand can alter the court of appeals' holding that the record below supports a vote dilution claim despite minority electoral success exceeding proportional representation. Neither will the proceedings on remand alter the court of appeals' refusal to consider evidence of non-racial voter motivation as part of its Section 2 analysis. Review is appropriate at this time.

The potential proceedings on remand also have no effect on the propriety of withholding disposition of this petition until the Court renders its opinions in *Johnson* v. *DeGrandy*, No. 92-519 (consolidated with *DeGrandy* v. *Johnson*, No. 92-593, and *United States* v. *Florida*, No. 92-767); and *Holder* v. *Hall*, No. 91-2012. Both the briefs and the oral arguments in those cases devoted substantial attention to the relevance of proportional representation in vote dilution claims. The Court's decisions in these cases are likely to provide important guidance in any further proceedings here.

Contrary to petitioner's suggestion that the "lower courts will have a full opportunity to address any new decisions," Br. Opp. 7, 18, the district court will of course proceed under the Third Circuit's opinion. New guidance from the Court on the correct approach to Section 2 would only leave the district court in a difficult position. It would be far fairer and more efficient to withhold a decision on this petition until *Holder* and *DeGrandy* are decided. While the better course would be to grant plenary review now, holding the petition would at least allow the Court to vacate the court of appeals' opinion and remand for further consideration if the decisions in the pending cases make it appropriate to do so.

2. Respondents' assertion that the opinion below was merely a routine rejection of a claim of "persistent

proportional representation," Br. Opp. 10, misses the whole point of the petition. As the petition made clear, a key problem with the Third Circuit's opinion is that it addressed the evidence of proportional minority electoral success *only* in the context of persistent proportional representation. *See* Pet. 18. The court of appeals omitted any consideration of proportional minority success in the context of the third *Gingles* factor. It is this aspect of the Third Circuit's holding — that white bloc voting "usually defeats" minority-preferred candidates despite minority electoral success in excess of proportional representation — which merits the Court's review.[1] *See* Pet. 18 (discussing divergent approach on "usually defeats" issue taken by *Nash* v. *Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992), *aff'd sub nom. African American Voting Rights Legal Defense Fund, Inc.* v. *Blunt*, 113 S. Ct. 1809 (1993)).

Respondents also recharacterize the court of appeals' opinion in other ways to make the court's legal holdings appear factbound. First, respondents describe as "misleading" the quotation of the court of appeals statement that the Red Clay minority success rate "exceeds proportional representation." Br. Opp. 7 n. 5. The best refutation of respondents' suggestion that this passage from the court of

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[1] Respondents' sole acknowledgement of this aspect of the petition is their shrill claim of "invented quotations." *See* Opp. Br. 11-12. It is true that in describing proportional representation and white bloc voting as distinct issues the Third Circuit used the words "two contexts" instead of the words "separate contexts." *See* Pet. App. 58a. Petitioners regret any confusion this misplaced quotation mark may have caused to respondents or the Court. But the fact remains that relevant portion of the court of appeals' opinion clearly distinguishes between white bloc voting and proportional representation. *Id.* The salient points are these: (1) the Third Circuit expressly stated that proportionality and white bloc voting were separate issues; and (2) the Third Circuit refused to address proportional minority electoral success in the context of evaluating white bloc voting, despite the requirement white bloc voting "usually defeat" minority-preferred candidates.

appeals' opinion merely "mentioned the petitioners' arguments," *id.*, is the opinion itself. *See* Pet. App. 54a-55a. The court of appeals plainly stated its recognition that the minority success rate exceeded proportional representation. Its statement in the following sentence that "defendants' argument fails, however, in light of the district court's finding on [persistent proportional representation]" is not a denial of the magnitude of minority electoral success; it is a rejection of defendants' position *despite* that success. *See id.* This is the exact point on which petitioners seek review.

Even less credible is respondents' contention that review is inappropriate because the opinion below depended upon factual findings of "special circumstances" in the relevant elections, Br. Opp. 8-10. The court of appeals *expressly disclaimed* any reliance on special circumstances in its holding on white bloc voting. Pet. App. 25a. It similarly excluded from its holding the question whether particular election results should be excluded from the analysis. Pet. App. 52a. Respondents' only acknowledgment of this critical point is their conclusory assertion that the court of appeals' description of the scope of its own holding is "immaterial," and the issue "academic." Br. Opp. 9 n. 6. Again seeking to turn a legal issue into a factual one, respondents emphasize that the *district court* relied on special circumstances. *Id.* The petition, however, seeks review of the *court of appeals* opinion. The court of appeals itself cast its holding in clear legal terms, unencumbered by any factual issue of special circumstances. *See* Pet. 12.

3. With respect to the issue of the relevance of voter motivation to vote dilution claims, respondents ignore the court of appeals' opinion altogether. Respondents present their own characterizations of trial testimony and the record below as though they were judicial findings. *See* Br. Opp. 13. Respondents' description of the record on the voter

motivation issue is not accurate.[2] But this is beside the point. The court of appeals did not, as respondents imply, Br. Opp. 12, reject particular factual evidence for "failure of proof." The court of appeals simply refused to consider evidence of racial motivation *at all*. It did so in compliance with the Tenth Circuit's opinion in *Sanchez* v. *Bond*, 875 F.2d 1488, 1493 (10th Cir. 1989), *cert. denied*, 498 U.S. 937 (1990), which it approved and adopted. *See* Pet. 21, Pet. App. 40a-41a.

Respondents' assertion that the *Sanchez* approach is not the law in the Third Circuit, Br. Opp. 14, is particularly

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[2] Expert evidence at trial showed a conclusively high degree of "correlation between the neighborhood of a voter and voter's choice of candidates with a particular view on the feeder pattern issue." Pet. App. 87a; Transcript of Dunivant trial testimony at 742 (noting "extreme degree of correlation"). Respondents' expert stated he would not rely on these correlations, however, because several validating statistical "assumptions were violated." Pet. App. 87a. But the district court rejected the expert's conclusion that these "assumptions" must be met in the context of evaluating the respondents' expert evidence. Pet. App. 86a, 90a. With the assumptions eliminated, the evidence on voter motivation stood unrefuted. Respondents' complaint that the feeder pattern issue affected "only two" elections, Br. Opp. 13, is also misleading, for the feeder pattern issue arose only in elections held in 1985 and thereafter. Prior to 1985, even respondents cannot deny there was proportional minority representation on the Board. *See* Pet. App. 79a.

Respondents' *ad hominem* attack on petitioners' description of the voter motivation evidence as "uncontested" and "uncontradicted," Br. Opp. 12, is thus stylistically consistent with the rest of the Brief in Opposition, but unfounded. Petitioners have taken a consistent view of this evidence throughout the litigation. *See* Pet. 8 (*quoting* petitioners' presentation of the "uncontradicted" evidence from the *Brief for Defendants-Appellees* in the Third Circuit). Respondents are entitled to disagree. For purposes of this petition, however, the relevant issue is the court of appeals' complete rejection of *all* voter motivation evidence — just as respondents had requested in that court.

ironic in light of their arguments before that court. Respondents argued below that evidence of voter motivation is "legally irrelevant" and that bloc voting analysis is "simply ... a correlation between the race of the voters and the votes for white and black candidates, without regard for the reasons or motivation." *See* Pet. 9 (*quoting Reply Brief for Plaintiffs-Appellants* 11-12). The court of appeals accepted respondents' view, and refused to address this evidence. The Fifth Circuit, in direct contrast, holds that voter motivation is highly relevant, and that nonracial voter motivations foreclose a vote dilution claim. *See League of United Latin American Citizens, Council No. 4434* v. *Clements*, 999 F.2d 831 (5th Cir. 1993), *petition for cert. filed*, No. 93-630 (October 21, 1993) ("*LULAC*").[3] The court should grant certiorari to address the issue.

Respectfully submitted,

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[3] Respondents' contention that the Third Circuit expressly reserved any holding on "the issue which divided the minority and the dissent in the panel decision in *LULAC*," Br. Opp. 16, is entirely off target. Respondents attempt to point at an issue raised in the *panel opinions* in *LULAC* pertaining to the evidentiary weight to be accorded the election of minority candidates who are not minority preferred. *Id.* at n. 17. The issue raised in this petition, however, is one from the Fifth Circuit's *en banc* opinions in *LULAC*. It is the more basic one concerning the relevance of voter motivation.